Asiatic Development Bhd & Anor v Balachandar a/l Palanysamy

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO M-02-16-95
SITI NORMA YAAKOB, MAHADEV SHANKAR JJCA AND ABDUL MALEK J
16 AUGUST 1995

Evidence *— Fresh or further evidence — Admission of fresh evidence on appeal — Application to adduce — Evidence not in existence at time of hearing — Whether evidence of opinion admissible — Whether evidence credible and would influence decision*

On 8 March 1991, there was a road accident at Batu 23, Jalan Tebong, Melaka between a van and a motor cycle ('the accident'). The van was owned by the first appellant and driven by the second appellant. The respondent was the rider of the motor cycle. The respondent filed a civil suit in the Malacca High Court. One of the witnesses called was the sergeant who investigated the accident. In his evidence, he said that he had found some scratch marks near the centre of the road close to the place where the motorcycle fell. But he stated in his examination-in-chief and cross-examination that these marks had been there before the accident and were therefore not caused by the accident. The High Court delivered judgment on 24 December 1994 and an appeal was made to the Court of Appeal. On 25 January 1995, the second appellant was prosecuted in the magistrates' court for driving without due care and attention in connection with the accident ('the criminal prosecution'). The sergeant again gave evidence. The appellants' counsel contended that during cross-examination, the sergeant gave evidence that the scratch marks were made by the accident and that this contradicted his earlier evidence. The appellants' counsel applied to adduce the sargeant's evidence in the criminal prosecution as fresh evidence on appeal.

Held, dismissing the application:

The sergeant's evidence as to when the scratch marks were made was purely his opinion and technically inadmissible as there was no evidence to show that it was empirically correct. The evidence may have been admissible because it was not available during the civil trial. However, since the evidence would not have had any influence on the trial judge and the sergeant's belief was purely subjective which meant that the court would have had to make up its own mind, the evidence was inadmissible.

[Bahasa Malaysia summary

Pada 8 Mac 1991, suatu kemalangan jalanraya berlaku di Batu 23, Jalan Tebong, Melaka di antara sebuah van dan sebuah motosikal ('kemalangan itu'). Van itu kepunyaan perayu pertama dan dipandu

oleh perayu kedua. Penentang adalah penunggang motosikal berkenaan. Penentang telah memfailkan suatu guaman sivil di Mahkamah Tinggi Melaka. Salah seorang saksi yang dipanggil adalah sarjan yang telah menyiasat kemalangan itu. Dalam keterangannya, beliau mengatakan bahawa beliau menjumpai beberapa kesan calar berhampiran dengan tengah jalan di mana motosikal itu jatuh. Tetapi semasa pemeriksaan utama dan pemeriksaan balasnya, beliau mengatakan bahawa kesan itu terdapat sebelum kemalangan dan oleh itu tidak diakibatkan oleh kemalangan itu. Mahkamah Tinggi telah memberikan penghakiman pada 24 Disember 1994 dan suatu rayuan telah dibuat ke Mahkamah Rayuan. Pada 25 Januari 1995, perayu kedua telah didakwa di mahkamah majistret kerana memandu tanpa kecermatan dan perhatian yang wajar berkaitan dengan kemalangan itu ('perbicaraan jenayah itu'). Sarjan yang sama telah memberi keterangan. Peguam perayu mengatakan bahawa semasa pemeriksaan balas, sarjan itu telah memberi keterangan bahawa kesan calar itu diakibatkan oleh kemalangan itu dan bahawa itu bercanggahan dengan keterangannya yang lebih awal. Peguambela perayu memohon untuk mengemukakan keterangan sarjan di dalam perbicaraan jenayah itu sebagai keterangan baru di dalam rayuan ini.

Diputuskan, menolak permohonan itu:

Keterangan sarjan mengenai masa bila kesan calar itu terjadi adalah pendapatnya sendiri dan secara teknikal tidak boleh diterima kerana tiada keterangan untuk menunjukkan bahawa keterangan itu sebenarnya betul. Keterangan itu mungkin boleh diterima kerana ianya tidak boleh didapati semasa perbicaraan sivil. Walau bagaimanapun, kerana keterangan itu tidak mungkin mempengaruhi hakim perbicaraan dan pendapat sarjan itu subjektif yang bermakna bahawa mahkamah perlu membuat keputusannya sendiri, keterangan itu tidak boleh diterima.]

Notes

For cases on fresh or further evidence, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 975–1003.

Cases referred to

Ladd v Marshall [1954] 3 All ER 745; [1954] 1 WLR 1489 (refd)
Lan Soo Sun v Government of Malaysia [1970] 2 MLJ 70 (folld)

Appeal from: Civil Suit No 23–16–91 (High Court, Melaka)

Toh Chin Chong (*Murphy & Dunbar*) for the appellant.
Raghbir Singh Gill (*Raghbir Singh Gill & Co*) for the respondent.

Cur Adv Vult

Mahadev Shankar JCA: This is an application to adduce fresh evidence on appeal.

On 8 March 1991, there was a traffic accident at Batu 23, Jalan Tebong, Melaka between a van and a motor cycle. The van was owned by the first appellant and driven by the second appellant. The respondent was the rider of the motor cycle. The respondent subsequently filed a civil suit in the Malacca High Court.

One of the witnesses called was the sergeant who investigated the accident. He went to the scene after the police report, drew a sketch plan, made a key and had photographs taken.

In his evidence in the civil suit on 4 August 1994, he said that he had found some scratch marks near the centre of the road close to the place where the motor cycle had come to rest. But he stated in his examination-in-chief that these marks had been there before the accident and they were therefore not involved in this accident. In cross-examination, he reiterated this evidence.

The High Court delivered judgment on 24 December 1994. Against that judgment there is now an appeal pending in this court.

On 25 January 1995, the van driver (the second appellant) was prosecuted in the Magistrates' Court in Alor Gajah for driving without due care and attention in connection with the same traffic accident. The sergeant again gave evidence. In his examination-in-chief, he produced the sketch plan. In cross-examination, his answer to most of the questions asked was that he could not remember or he was not sure. Then came these questions and answers:

S: Rajah kasar dan kunci, P2 dan P2K, dibuat berdasarkan apa yang kamu lihat yang ada kaitan dengan kemalangan kes?

J: Ya, setuju.

S: Apakah 'J'?

J: Kesan calar pada jalanraya.

The contention of the appellants' counsel before us is that this means that he was now saying the scratch marks were made by this traffic accident and was in contradiction to the sergeant's earlier evidence that these scratch marks had nothing to do with the accident at all and had been there before.

We think that counsel's interpretation is quite untenable. The question 'Rajah kasar dan kunci, P2 dan P2K, dibuat berdasarkan apa yang kamu lihat yang ada kaitan dengan kemalangan kes?' must not be understood in the context of this case to mean that the scratch marks were caused by the accident. Taken in its proper context all that it could mean is that the sergeant was agreeing that what he put in the sketch plan was what he saw at the scene. Nowhere in the criminal proceedings has he stated that the scratch marks were made by this accident.

The sergeant's evidence as to when the scratch marks were made was purely his opinion. Technically it was inadmissible because no evidence

had been led to show that the sergeant's evidence on this point was empirically correct. A

This application involves a very important principle of law to which neither counsel appears to have fully directed his mind.

Appellants' counsel cited *Ladd v Marshall* [1954] 3 All ER 745; [1954] 1 WLR 1489. He suggested that merely because this evidence was not available at the civil trial, it should now be put in. *Ladd v Marshall* was applied by the Federal Court in *Lan Soo Sun v Government of Malaysia* [1970] 2 MLJ 70 at p 71. Suffian FJ (as he was then) said: B

> To justify the reception of this evidence three conditions must be fulfilled:
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> First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; C
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> Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive;
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> Third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently creditable, although it need not be incontrovertible. D
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> These were the tests enunciated by Denning LJ (as he then was) at p 748 in *Ladd v Marshall* [1954] 3 All ER 745.

It is self-evident that the new evidence sought to be adduced completely failed the second and third conditions because first of all, it should have had no influence whatsoever on the trial judge and secondly, even if the opinion of the sergeant was admissible which, in the circumstances of this case it was not, the sergeant's belief was purely subjective and the court would have had to make up its own mind. E

Consequently, we held that this application was wholly misconceived and therefore dismissed it with costs. F

We wish to add that after conclusion of the arguments on 14 August, we adjourned the matter for judgment. As we were about to deliver our decision on the morning of the 16th, the respondent's counsel handed up a list of 11 authorities. This was done all too late and to no purpose. We, therefore, direct that the costs to be paid by the applicant should not include any cost whatsoever to the respondent for looking up the law. G

Application dismissed.

Reported by Azra Azman H

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